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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

U HANGING SEVEN RANCH, INC. a Montana profit corporation, QUARTER CIRCLE UU RANCH, a Montana profit corporation, and CODY JOHNSON, individually, Plaintiffs, v. ONEOK ELK CREEK PIPELINE, L.L.C., a foreign limited liability company, Defendant.	CV-22-21-BLG-SPW-KLD **DEFENDANT'S RESPONSE TO PLAINTIFFS' BRIEF IN SUPPORT OF MOTION TO REMAND**

Defendant ONEOK Elk Creek Pipeline, L.L.C. ("ONEOK") submits its response brief in opposition to Plaintiff's Motion to Remand.

FACTUAL BACKGROUND

On March 28, 2019, Defendant entered into an Easement and Right-of-Way Agreement with Plaintiff Quarter Circle UU Ranch (hereinafter referred to as the "Agreement"). Per the terms of the Agreement, Plaintiff granted a permanent easement over the property for the purpose of building a petroleum pipeline. ECF Doc. No. 1, Ex. A, p. 1. During the construction of this pipeline, Plaintiff claims that Plaintiff U Hanging Seven Ranch, Inc. kept cattle in fenced pastures and grew hay on Plaintiff Quarter Circle UU Ranch's property. ECF Doc. No. 5, p. 5, ¶ 23.

Plaintiff claims that during the construction of this pipeline, Defendant's subcontractor "broke fence gates, left gates open and unattended, and broke underground water pipes." *Id.* at ¶ 25. Plaintiff alleges that this conduct allowed Plaintiff U Hanging Seven Ranch, Inc.'s cattle to escape, breed, and charge Plaintiff Cody Johnson. *Id.* at ¶¶ 28–35. In addition to Plaintiff Cody Johnson's alleged bodily injuries, Plaintiffs allege that the cattle's breeding was improper and resulted in damage to the herd. *Id.* at ¶¶ 30–38. Finally, Plaintiffs claim that Defendant's pipeline construction injured and killed four cows and one bull. *Id.* at ¶ 38.

PROCEDURAL HISTORY

Plaintiffs filed their complaint in the District Court of the Sixteenth Judicial District in Fallon County. Several months later, ONEOK received a Summons and copy of the Complaint. ONEOK then timely filed its Notice of Removal with this

Court. ONEOK based subject matter jurisdiction on 28 U.S.C. §§ 1332(a)(1), 1441, and 1446.

On March 17, Plaintiffs filed their Motion to Remand. They ground their motion on the language of the Governing Law Clause of the Agreement.

LEGAL STANDARD

An action may be removed to federal court if the federal court could have exercised original jurisdiction. *See, e.g.*, *Andersch v. Northwestern Corp.*, 2010 WL 3034606, at *1 (D. Mont. 2010) (citing 28 U.S.C. § 1441). While federal courts strictly construe the right to remove, courts "must be equally vigilant in protecting a defendant's right to proceed in federal court as it is in respecting the state court's right to retain jurisdiction." *Hialeah Anesthesia Specialists, LLC v. Coventry Health Care of Fla., Inc.*, 258 F. Supp. 3d 1323, 1327 (S.D. Fla. 2017). "Removal based on diversity jurisdiction is intended to protect out-of-state defendants from possible prejudices in state court." *Lively v. Wild Oats Markets, Inc.*, 456 F.3d 933, 940 (9th Cir. 2006) (citing *Tosco Corp. v. Cmtys. for a Better Env't.*, 236 F.3d 495, 502 (9th Cir. 2001)). Federal district courts enjoy discretion to grant or deny a motion to remand. *See Baddie v. Berkeley Farms, Inc.*, 64 F.3d 487, 490 (9th Cir. 1995).

ARGUMENT

I. Plaintiffs' Motion to Remand should be denied because the Agreement's Governing Law Clause is permissive, not exclusive.

Plaintiffs argue that the language of the Agreement mandates that the parties litigate their disputes in Fallon County. In diversity cases, the interpretation and enforcement of a forum selection clause is governed by federal law. *Fayle v. TSYS Merchant Solutions, LLC*, 470 F. Supp. 3d 1182, 1184 (D. Mont. 2020) (citing *Doe 1 v. AOL LLC*, 552 F.3d 1077, 1081 (9th Cir. 2009)). Under federal law, "'the plain language of the contract should be considered first[.]'" *Simonoff v. Expedia, Inc.*, 643 F.3d 1202, 1205 (9th Cir. 2011) (quoting *Klamath Water Users Protective Ass'n v.* Patterson, 204 F.3d 1206, 1210 (9th Cir. 1999)). "[T]he common or normal meaning of language will be given to the words of a contract unless circumstances show that in a particular case a special meaning should be attached to it." *Doe 1*, 552 F.3d at 1081.

The first interpretive issue is whether the Governing Law Clause is mandatory or permissive. When interpreting forum selection clauses, federal courts presume that forum selection clauses are permissive—the parties merely authorize jurisdiction in a designated forum and do not prohibit litigation elsewhere. *See, e.g.*, *Target Corp. v. Seaman Corp.*, 2019 WL 3822325, at *6 n.1 (D. Minn. 2019)(citing *Fla. State Bd. of Admin. v. Law Eng'g & Envtl. Servs., Inc.*, 262 F. Supp. 2d 1004, 1009 (D. Minn. 2003)). On the other hand, mandatory forum

selection clauses dictate the exclusive forum for the litigation of claims. *Yankeecub, LLC v. Fendley*, 2021 WL 3603053, at *3 (D. Mont. 2021). For a forum selection clause to be considered mandatory and thus restrict venue to the court specified in the agreement, the language must clearly designate the court as the exclusive forum. *See Avista Corp. v. Northwestern Corp.*, 2021 WL 6061795, at *4 (E.D. Wash. 2021)(citing *Hunt Wesson Foods, Inc. v. Supreme Oil Co.*, 817 F.2d 75, 76-77 (9th Cir. 1987)).

As a preliminary matter, Plaintiffs' point that Defendants drafted the Agreements rings hollow. Ordinarily, when contractual terms are ambiguous, a court should construe the language against the drafter of the contract. *See, e.g.*, *Interpetrol Bermuda Ltd. v. Kaiser Aluminum Int'l Corp.*, 719 F.2d 992, 998 (9th Cir. 1983). But even assuming that the Governing Law Clause is reasonably susceptible of more than one interpretation, the Agreement provides that "the terms and provisions . . . are not to be construed more liberally in favor of, or more strictly against, either Party." ECF Doc. No. 1., Ex. A., p. 12.

In this case, the plain language of the Agreement makes clear that the parties merely authorized jurisdiction in Fallon County:

> This Agreement shall be governed by the laws of the State of Montana, and the venue of any action brought concerning the interpretation or enforcement of this Agreement shall be proper in the County in which the Property is located.

ECF Doc. No. 1., Ex. A., p. 12.

Federal courts across the circuits interpreting similar language have concluded that such language is permissive, not mandatory. *Caldas & Sons, Inc. v. Willingham*, 17 F.3d 123 (5th Cir. 1994) ("[t]he laws and courts of Zurich are applicable."); *King v. PA Consulting Group, Inc.*, 78 Fed. Appx. 645, 646 (10th Cir. 2003) ("[t]his agreement and all matters arising in connection with it shall be governed by the law of the State of New Jersey and shall be subject to the jurisdiction of the New Jersey Courts."); *see also John Boutari & Son, Wines & Spirits, S.A. v. Attiki Imps. & Distribs. Inc.*, 22 F.3d 51, 52 (2d Cir. 1994) ("[t]his Agreement shall be governed and construed to the Laws of Greece. Any dispute arising between the parties hereunder shall come within the jurisdiction of the competent Greek Courts, specifically of the Thessaloniki Courts.").

Hunt Wesson Foods, Inc. v. Supreme Oil Co. is strikingly identical to this case. 817 F.2d 75 (9th Cir. 1987). In that case, Hunt Wesson Foods sold vegetable oil to Supreme Oil. *Id.* at 76. The parties' contract included a forum selection clause just like the one in this case:

> Buyer and Seller expressly agree that the laws of the State of California shall govern the validity, construction, interpretation, and effect of this Contract. The courts of California, County of Orange, shall have jurisdiction over the parties in any action at law relating to the subject matter or interpretation of this contract.

Id.

When Supreme realized the vegetable oil did not conform to the quality specifications in the contract, Supreme refused to pay the contract price, and Hunt filed a complaint in the California Superior Court for Orange County. *Id.* After Hunt served Supreme with process, Supreme filed a notice of removal before the United States District Court for the Central District of California, which Hunt challenged. Supreme—like ONEOK in this case—argued that the forum selection clause did not grant state court exclusive jurisdiction. *Id.* The district court disagreed and remanded the matter back to the state court. *Id.* After the district court denied Supreme's motion for relief, it appealed to the Court of Appeals for the Ninth Circuit, arguing that the district court erred in interpreting the clause as a mandatory forum selection clause. *Id.* at 77.

The Court agreed. *Id.* at 77-78. The Court reasoned the plain meaning of the clause is that the state court shall have jurisdiction over the action; the language said "nothing about the Orange County courts having exclusive jurisdiction." *Id.* at 77. Even though the word "shall" is a mandatory term, it mandated only that Orange County courts had jurisdiction. *Id.* Without more language indicating that only Orange County courts had jurisdiction, the forum selection clause did not exclude the parties from litigating claims in other forums. *Id.* at 78.

Mandatory forum selection clauses require that litigation occur *only* in a specific court. Consider *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*,

741 F.2d 273 (9th Cir. 1984). In that case, the Court ruled that the forum selection clause was mandatory because the language excluded all other forums: "this Agreement shall be litigated *only* in the Superior Court for Los Angeles (*and in no other*)." *Id.* at 725 (emphasis added).

The cases upon which Plaintiffs rely on are inapposite; all involved mandatory language. *See Kamm v. ITEX Corp.*, 568 F.3d 752, 754 (9th Cir. 2009) ("[a]ny action brought by any party to this Agreement shall be filed and venue shall be *in the courts of the State of Oregon*.") (emphasis added); *see also Polzin v. Appleway Equip. Leasing, Inc.*, 191 P.3d 467, 478 (Mont. 2008) ("[i]f any Legal Action or other proceeding shall be brought on or in connection with the Equipment or this Lease, the venue of such Legal Action shall, at the option of the Lessor, be in any State or County where any of the Equipment is then located, *or in Spokane County, Washington*.") (emphasis added).

Here, the Governing Law Clause does not exclude all forums other than those in Fallon County. Rather, the plain language illustrates that venue is *proper* in Fallon County; it does not state that venue is proper *only* in Fallon County, or that the case can only be filed in state court. Like the forum selection clause in *Hunt Wesson Foods, Inc.*, the Governing Law Clause in this case merely consents to the venue in Fallon County. Despite the word "shall", the parties did not mandate that litigation must occur solely in Fallon County. Even if jurisdiction

"shall be proper" in Fallon County, the plain meaning of the parties' Agreement illustrates that jurisdiction is proper elsewhere, too.

II. Plaintiffs' Motion to Remand should be denied because the Governing Law Clause identifies this Court as the proper venue.

Even if this Court disagrees, and finds that the Governing Law Clause is mandatory, Plaintiff's motion should still be denied because this Court is the only venue overseeing Fallon County. Under L.R. 1.2(c)(1), the Billings Division contains Fallon County. The Governing Law Clause plainly states that *venue* shall be proper in Fallon County. Venue "refers to the geographic specification of the proper court . . . for the litigation of a civil action that is within the subject-matter jurisdiction of the district courts in general." 28 U.S.C. § 1390. The only federal venue overseeing Fallon County is this Court. Contrary to Plaintiffs' argument, this Court is the proper venue to oversee this matter.

III. Even if the Governing Law Clause is mandatory, Plaintiff Cody Johnson is not a party to the Agreement.

Finally, Plaintiff Cody Johnson is not entitled to remand because he is not a party to the Agreement. Forum selection clauses are unenforceable against a non-party to the agreement unless the non-party's claims are "closely related" to the rights and duties enumerated in the agreement. *Manila Indus., Inc. v. Ondova Ltd. Co.*, 334 Fed. App'x. 821, 823 (9th Cir. 2009). For a non-party's claims to be so closely related, the non-party must have a claim that requires resolution of some

aspect of the contract. *Willis v. Princess Cruise Lines*, 2020 WL 5353984, at *7 (C.D. Cal. 2020) (citing *Manila Indus., Inc.*, 334 F. App'x at 823 (9th Cir. 2009)).

Here, Plaintiff Cody Johnson's claim need not be resolved with Plaintiffs U Hanging Seven Ranch, Inc., and Quarter Circle UU Ranch's claims. Cody Johnson alleges that Defendant had a duty to close certain pasture gates, breached this duty, and such breach resulted in his being charged by a bull and sustaining bodily injuries. ECF Doc. 1, Ex. 2, pp. 6, 8. This event does not involve the subject-matter of the Agreement—the easements and rights-of-way. Accordingly, even if this Court concludes that the Governing Law Clause mandates that litigation occur in Fallon County, Plaintiff Cody Johnson cannot benefit from the forum selection clause and have his claims remanded, too.

CONCLUSION

For the forgoing reasons, the Court should deny Plaintiffs' Motion to Remand. Defendants properly removed this action to this Court based on diversity jurisdiction, pursuant to 28 U.S.C. §§ 1332. The plain meaning of the parties' Agreement allowed removal to this Court. Contrary to Plaintiffs' argument, the Agreement does not require that their claims be heard *only* in Fallon County state court. Instead, the plain language of the Agreement grants both parties jurisdictional flexibility. Accordingly, the Court should deny Plaintiff's Motion for Remand.

DATED this 31st day of March, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to L.R.7.1(d)(2)(E), I certify that this *Response to Plaintiffs' Brief in Support of Motion to Remand* is printed with proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; and the word count, calculated by Microsoft Office Word is 2217 words long, excluding the caption, Certificate of Service, and Certificate of Compliance

DATED this 31st day of March, 2022.

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